The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES & DISCIPLINE

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OPINION 2011-2
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Multijurisdictional Practice and Debt Settlement Legal Services

SYLLABUS: An out-of-state lawyer is not authorized to provide debt settlement legal services, including investigation, negotiation, and other nonlitigation activities, on a temporary basis in Ohio under Prof. Cond. Rule 5.5(c)(4) when the matter is not connected to the lawyer's jurisdiction of admission to the practice of law, there is not a pre-existing relationship between the lawyer and the client, and the lawyer does not have a recognized expertise in a particular body of federal, nationally-uniform, foreign, or international law that is applicable to the matter. Under these circumstances, the nonlitigation activities do not arise out of, and are not reasonably related to, the lawyer's practice in his or her jurisdiction of admission for purposes of Prof. Cond. Rule 5.5(c)(4).

QUESTION PRESENTED: Do the temporary practice provisions of Prof. Cond. Rule 5.5(c) (Unauthorized practice of law; multijurisdictional practice of law) authorize out-of-state lawyers to provide debt settlement legal services to Ohio clients?

FACTS: A self-proclaimed "national law firm" located in another state provides legal services in the areas of consumer debt and foreclosure relief. The firm's lawyers are not admitted to the practice of law in Ohio, and the firm does not associate with Ohio lawyers or maintain an Ohio office. The firm advertises its services on the internet. Ohio residents, with no prior contact with the firm, locate the firm's website and subsequently contract with the firm's lawyers for debt settlement legal services. The lawyers investigate the debt of the Ohio clients and negotiate with their creditors in an effort to settle debts for less than the amount owed. The creditors are located in both Ohio and other states. Neither litigation nor alternative dispute resolution proceedings are pending

involving the Ohio clients. The firm charges a monthly fee to the Ohio clients for the debt settlement legal services.

APPLICABLE RULE: Rule 5.5 of the Ohio Rules of Professional Conduct

OPINION: This is the Board's first advisory opinion on Prof. Cond. Rule 5.5, which the Supreme Court of Ohio adopted effective February 1, 2007. However, the Board addressed the viability of out-of-state lawyers practicing in Ohio more than twenty years ago. In Opinion 90-12, the Board was asked to determine whether out-of-state lawyers may represent out-of-state lending institutions in real estate transactions involving Ohio residents and property. In these transactions, the out-of-state lawyers prepared loan documents, negotiated contracts, and represented the lenders at the loan closing. The lender clients were located in jurisdictions where the lawyers were admitted to practice. Finding that the provision of legal services by the out-of-state lawyers in Ohio was in the best interest of the lender clients, the Board concluded that the practice was permissible. In particular, the Board stated that the Ohio practice should be "tolerated" when "the client is a regular client and 'either (1) the lawyer's presence is an isolated occurrence and the work is not extensive in duration or (2) the in-state practice is more extensive but is incidental to advising a client on a multi-state problem.'" Ohio Sup. Ct., Bd. Of Comm'rs on Grievances and Discipline, Op. 90-12, at 2 (Aug. 17, 1990), citing Wolfram, Modern Legal Ethics, 867 (1986). The Board further found that "a persistent practice in Ohio would be considered the unauthorized practice of law." Id.

Twelve years later, the American Bar Association (ABA) addressed the multijurisdictional practice concepts discussed in Opinion 90-12 through changes to the Model Rules of Professional Conduct. In 2002, the ABA amended Model Rule 5.5 to allow out-of-state lawyers to engage in the multijurisdictional practice of law "in identifiable situations that serve the interests of clients and the public and do not create an unreasonable regulatory risk." ABA Center for Professional Responsibility, A Legislative History: The Development of the ABA Model Rules of Professional Conduct 1982-2005, at 625 (2006).

In 2007, the Supreme Court of Ohio created a framework for multijurisdictional practice in Ohio as part of the adoption of the Ohio Rules of Professional Conduct. The Ohio Rules are based upon the ABA Model Rules and Ohio's multijurisdictional practice provisions are found in Prof. Cond. Rule 5.5. As indicated by the Supreme Court's Task Force on Rules of Professional

Conduct (Task Force), "[t]o provide complete client service, a lawyer occasionally may be required to perform work in a jurisdiction in which the lawyer is not admitted…the adoption of ABA Model Rule 5.5 [is endorsed]…to establish certain safe harbors from charges of unauthorized practice of law for lawyers admitted elsewhere than Ohio." Report of the Supreme Court Task Force on Rules of Professional Conduct, 25 (Oct. 2005). Prof. Cond. Rule 5.5 varies only slightly from Model Rule 5.5. Id.

The central premise of Prof. Cond. Rule 5.5 is that a lawyer not admitted to practice in Ohio may not "establish an office or other systematic presence in [Ohio] for the practice of law" unless authorized to do so by the Ohio Rules of Professional Conduct or other law. Prof. Cond. Rule 5.5(b)(1). Also, a lawyer not admitted in Ohio may not "hold out or otherwise represent that the lawyer is admitted to practice law in [Ohio]." Prof. Cond. Rule 5.5(b)(2).

Prof. Cond. Rule 5.5(c) contains the "safe harbors" referenced by the Task Force, and permits a lawyer not admitted in Ohio to provide legal services on a temporary basis in Ohio if the services fall within one or more of four categories. Specifically, out-of-state lawyers may provide legal services on a temporary basis in Ohio if:

- The services are undertaken in association with a lawyer who is admitted to practice in [Ohio] and who actively participates in the matter;
- The services are reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;
- The services are reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission;
- The lawyer engages in negotiations, investigations, or other nonlitigation activities that arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

Prof. Cond. Rule 5.5(c)(1)-(4).

In the hypothetical posed to the Board, out-of-state lawyers are providing debt settlement legal services to Ohio clients. Because the lawyers are not admitted to practice in Ohio, their conduct constitutes the unauthorized practice of law unless it falls within one of the four temporary practice exceptions set out in Prof. Cond. Rule 5.5(c).[1] The first three exceptions, however, clearly do not apply. The debt settlement legal services are not being provided through association with Ohio lawyers, related proceedings are not pending before tribunals, and the services are not related to alternative dispute resolution proceedings. See Prof. Cond. Rule 5.5(c)(1)-(3). The remaining question is whether the exception contained in Prof. Cond. Rule 5.5(c)(4) for nonlitigation activities authorizes out-of-state lawyers to provide debt settlement legal services for Ohio clients.

Again, for temporary practice in Ohio to be authorized under Prof. Cond. Rule 5.5(c)(4), the out-of-state lawyer must engage in "negotiations, investigations, or other nonlitigation activities that arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice."[2] As with Model Rule 5.5(c)(4), Prof. Cond. Rule 5.5(c)(4) "recognizes that the complexity of a specific matter undertaken on behalf of a client in a jurisdiction in which the lawyer is admitted may require that the lawyer travel to other jurisdictions on an occasional basis, for example, to interview or consult with employees or other persons associated with the client concerning the matter." ABA Legislative History, supra, at 619.

The Official Comment to Prof. Cond. Rule 5.5 contains substantial guidance for determining whether an out-of-state lawyer's nonlitigation activities "arise out of" or are "reasonably related" to the lawyer's home state practice. In Comment [14], the following seven factors are identified as evidence of this relationship:

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[1] Under Prof. Cond. Rule 5.5(d), out-of-state lawyers may practice in Ohio if they are registered as corporate counsel pursuant to Gov. Bar R. VI or providing legal services that are authorized by federal or other law. There is no indication that the out-of-state debt settlement lawyers fall within these practice designations.

[2] The nonlitigation activities "include both legal services and services that nonlawyers may perform but that are considered the practice of law when performed by lawyers." Prof. Cond. Rule 5.5, Comment [13].

- The client was previously represented by the lawyer;
- The client is a resident in or has substantial contacts with the lawyer's state of admission;
- The matter at issue has a significant connection with the lawyer's state of admission;
- A significant portion of the lawyer's work is conducted in the state of the lawyer's admission;
- A significant aspect of the matter at issue involves the law of the lawyer's state of admission;
- The client's activities or the legal issues involve multiple jurisdictions;
- The lawyer has a recognized expertise in "matters involving a particular body of federal, nationally-uniform, foreign, or international law."

Prof. Cond. Rule 5.5, Comment [14]. These factors come directly from a leading treatise on legal practice. See Restatement (Third) of The Law Governing Lawyers § 3 cmt. e (2001). As an example of appropriate temporary practice by an out-of-state lawyer, the Restatement references a multinational corporation asking its lawyer to assist with selection of a location for a new United States facility by negotiating with local officials on zoning, taxation, and environmental matters. Id. The commentary to Prof. Cond. Rule 5.5 makes a similar illustration of appropriate temporary practice when multiple jurisdictions are involved and "the officers of a multinational corporation survey potential business sites and seek the services of their lawyer in assessing the relative merits of each." Prof. Cond. Rule 5.5, Comment [14].

The ABA Commission on Multijurisdictional Practice's 2002 report, which spawned the temporary practice provisions of Model Rule 5.5, is also instructive. The ABA Commission identified three categories of temporary practice that would be justified under Model Rule 5.5(c)(4), upon which Prof. Cond. Rule 5.5(c)(4) is based. First, Rule 5.5(c)(4) is "intended…to cover services that are ancillary to a particular matter in the home state" when the lawyer is "one who practices law in the client's state or in a state with a connection to the legal matter that is the subject of the representation." ABA, Report of the Commission on Multijurisdictional Practice, 7 (Aug. 2002). Second, Rule 5.5(c)(4) "respect[s] preexisting and ongoing client-lawyer relationships by permitting a client to retain a lawyer to work on multiple related matters" where "clients are better served by having a sustained relationship with a lawyer or law firm in whom the

client has confidence." Id. at 7-8. Third, the Commission indicated that Rule 5.5(c)(4) would allow temporary practice by a lawyer who "has developed a recognized expertise in a body of law that is applicable to the client's particular matter." Id. at 8. Practice areas of "recognized expertise" cited by the Commission include federal tax, securities, or antitrust law and the law of a foreign jurisdiction. Id. Particularly telling is the Commission's statement regarding a client's hiring of a lawyer for the first time: "[W]ork for an out-of-state client with whom the lawyer has no prior professional relationship and for whom the lawyer is performing no other work ordinarily will not have the requisite relationship to the lawyer's practice where the matter involves a body of law in which the lawyer does not have special expertise." Id. at 10.

Applying the seven factors outlined in Prof. Cond. Rule 5.5, Comment [14], and the concepts detailed in the legislative history of Model Rule 5.5, the Board concludes that the hypothetical out-of-state debt settlement lawyers are not authorized to practice law temporarily in Ohio. The Ohio clients became aware of the out-of-state lawyers for the first time through an internet search, and had no prior contact or relationship with the lawyers. The clients are not residents of the lawyers' home jurisdictions of licensure, and the work done for the clients crosses into a number of jurisdictions where the creditors are located. The lawyers may be physically located in their state of licensure, but a significant portion of the work done for the clients is not centrally located in that home state. The debt settlement work performed by the out-of-state lawyer is likely not governed by the law of the lawyers' home state, as the Ohio clients may be facing state law collection actions and presumably have Ohio assets as well as income and debt incurred in Ohio.

While the Ohio clients have creditors in multiple jurisdictions, a factor identified in Comment [14], this alone does not establish the "reasonable relationship" envisioned by the drafters of Model Rule 5.5 and Prof. Cond. Rule 5.5. As evidenced by the examples described in the Restatement, Model Rule 5.5 was intended to address transactional practice for multijurisdictional, national, or multinational clients with complex legal needs, not individuals facing personal legal issues such as consumer debt. In regard to any "recognized expertise" in a "particular body of federal, nationally-uniform, foreign, or international law," it is the Board's opinion that general debtor / creditor law is not the type of nationally-uniform law intended by the drafters that, without more of a nexus between lawyer and client, would permit multijurisdictional practice under Prof. Cond. Rule 5.5(c)(4). The primary areas of concern for

clients seeking debt settlement legal services are consumer protection, debt collection, garnishment, repossession, foreclosure, and general contract law. Even though some federal statutes may come into play, such as the Fair Debt Collection Practices Act,[3] all of these areas implicate state law in Ohio. In addition, an internet search for "debt settlement law firms," similar to the search probably conducted by the Ohio clients, produces approximately two million results.[4] Facing this many website options, a typical consumer could not realistically identify lawyers with a "recognized expertise" in an area of nationally-uniform law that may justify temporary practice in Ohio.

In finding that Prof. Cond. Rule 5.5(c)(4) does not permit temporary practice in Ohio based upon the facts presented, it is not the Board's intention to reconstruct the geographical barriers denounced in Opinion 90-12. The modern practice of law is complex and in many legal fields a lawyer cannot satisfy his or her duty to provide competent representation without crossing state lines. As stated by the ABA's Commission on Multijurisdictional Practice, "under certain circumstances, it is in the public interest for a lawyer admitted in one United States jurisdiction to be allowed to provide legal services in another United States jurisdiction because the interests of the lawyer's client will be served if the lawyer is permitted to render the particular services, and doing so does not create an unreasonable risk to the interests of the lawyer's client, the public or the courts." Commission Report, supra, at 1. As previously stated, temporary practice by out-of-state lawyers serves the interests of the public and clients when there is a connection to a home state matter, an existing client-lawyer relationship, or a recognized expertise in an area of federal, nationally-uniform, foreign, or international law. The debt settlement hypothetical presented to the Board does not fulfill these criteria, especially given that lawyers are exempt from the Ohio Debt Adjusters Act[5], which protects Ohio consumers receiving debt settlement services. The Board cannot conclude that it is in the best interests of clients and the public to allow out-of-state lawyers to provide debt settlement legal services to Ohio clients whose sole connection to the lawyers is an internet search.

Although the Board was asked to analyze the practice of the out-of-state debt settlement lawyers only in regard to Prof. Cond. Rule 5.5(c), the conduct of the lawyers may potentially violate other provisions of Prof. Cond. Rule 5.5. For

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[3] See 15 U.S.C. §§1692-1692p.
[4] Search results as of October 7, 2011.
[5] See R.C. 4710.03(B).

example, through internet advertising and representation of a number of Ohio clients, the lawyers may have established a "systematic and continuous presence for the practice of law" in Ohio. See Prof. Cond. Rule 5.5(b)(1) and Comment [4]. "Systematic and continuous presence" includes both physical and virtual presence in Ohio. Id. Also through internet advertising, the lawyers may have "[held] out to the public or otherwise represent[ed] that [they are] admitted to practice law" in Ohio. See Prof. Cond. Rule 5.5(b)(2). For purposes of this opinion, the Board assumes the lawyers' Ohio practice was "temporary" and does not address the question of whether the practice was actually "systematic and continuous," which would require admission in Ohio. The Board also does not have sufficient information to evaluate the lawyers' fee structure and methods of advertising in relation to other provisions of the Ohio Rules of Professional Conduct. See, e.g., Prof. Cond. Rules 1.5 (Fees and expenses), 7.1 (Communications concerning a lawyer's services), and 7.3 (Direct contact with prospective clients).

CONCLUSION: Applying the "reasonable relationship" factors set out in Prof. Cond. Rule 5.5, Comment [14], it is the Board's opinion that the hypothetical out-of-state debt settlement lawyers are not engaged in nonlitigation activities that arise out of or are reasonably related to the lawyers' practice in their jurisdiction of admission. The Ohio clients' matters are not connected to the lawyers' home state of admission, there is not a pre-existing relationship between the lawyers and the clients, and the lawyers do not have a recognized expertise in a particular body of federal, nationally-uniform, foreign, or international law that is applicable to the consumer debt matters. Accordingly, the out-of-state debt settlement lawyers are not authorized to provide legal services on a temporary basis in Ohio pursuant to Prof. Cond. Rule 5.5(c).

Advisory Opinions of the Board of Commissioners on Grievances and Discipline are informal, nonbinding opinions in response to prospective or hypothetical questions regarding the application of the Supreme Court Rules for the Government of the Bar of Ohio, the Supreme Court Rules for the Government of the Judiciary, the Ohio Rules of Professional Conduct, the Ohio Code of Judicial Conduct, and the Attorney's Oath of Office.